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No. 84-1805

In the Supreme Court of the United States

OCTOBER TERM, 1985

TULALIP TRIBES OF WASHINGTON, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Access to Justice Act, 28 U.S.C. 2412, which under certain circumstances provides for the award of attorneys' fees "in addition to any costs," authorizes the assessment of attorneys' fees against the Federal Energy Regulatory Commission in a case arising under the Federal Power Act, 16 U.S.C. 791 *et seq.*, which specifically prohibits the award of costs against the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 749 F.2d 1367. A prior opinion of the court of appeals (Pet. App. 6-14) is reported at 732 F.2d 1451.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1984, and a petition for rehearing was denied on February 15, 1985 (Pet. App. 42-43). The petition for a writ of certiorari was filed on May 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of petitioners' successful challenge to a Federal Energy Regulatory Commission rule on hydroelectric projects involving "natural water features." Section 408 of the Energy Security Act of 1980, 16 U.S.C.

2708, authorizes the Commission to exempt from the otherwise applicable licensing requirements of the Federal Power Act, 16 U.S.C. 791a *et seq.*, projects using natural water features "without the need for any dam or impoundment" (16 U.S.C. 2708(b)). The Commission issued implementing regulations (18 C.F.R. 4.102(a)) permitting projects utilizing diversion structures up to ten feet in height to qualify for such exemptions. On petition for review, the court of appeals invalidated the Commission's regulations on the grounds that they were inconsistent with the plain meaning of the statutory word "dam" and were not supported by the "scanty and inconclusive" legislative history (Pet. App. 6-14).

2. Following the court of appeals' decision on the merits, petitioners moved for an award of costs and attorneys' fees against the Commission. Petitioners relied on the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, which, inter alia, allows a prevailing party to collect costs against the government, except as otherwise specifically provided by statute (28 U.S.C. 2412(a)). "[I]n addition to any costs awarded pursuant to subsection (a)," subsection (d) of the EAJA authorizes a prevailing party to collect attorneys' fees against the government unless the court finds that the government's position was "substantially justified" or that special circumstances would make an award unjust (28 U.S.C. 2412(d)(1)(A)). Similarly, subsection (b) of the EAJA authorizes a court to assess attorneys' fees against the government, "in addition to the costs which may be awarded pursuant to subsection (a)," whenever and "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award [of attorneys' fees]" (28 U.S.C. 2412(b)). Petitioners contended that they were entitled to both costs and attorneys' fees because they were the prevailing parties, the Commission could not show that

its position had been substantially justified within the meaning of subsection (d), and the Commission had litigated this case in bad faith such that an award under the common law, as incorporated by subsection (b) of the EAJA, was appropriate. (Petitioners did not cite subsection (b) in their initial application for fees; they first mentioned it in their reply brief in the court of appeals.)

The Commission opposed petitioners' request for costs and fees, arguing that the Commission is not subject to the EAJA's general provision for cost awards (28 U.S.C. 2412(a)), because Section 317 of the Federal Power Act, 16 U.S.C. 825p, explicitly prohibits the recovery of costs from the agency. The Commission also argued that the EAJA did not authorize an award of attorneys' fees, because the Act refers to attorneys' fee awards only "*in addition to*" any costs awarded pursuant to subsection (a), and the Commission is not liable for such costs.

The court of appeals agreed with the Commission (Pet. App. 1-5). The court reasoned that the Federal Power Act specifically provides that "[n]o costs shall be awarded against the Commission in any judicial proceeding under this chapter" (16 U.S.C. 825p); that because petitioners had invoked the jurisdiction of the court of appeals under Section 313 of the Federal Power Act, 16 U.S.C. 825*l*, the proceeding had arisen "under this chapter," *i.e.*, the Federal Power Act; and that petitioners therefore were not entitled to costs (Pet. App. 3).

Relying on its holding as to costs, the court of appeals agreed with the Commission on the attorneys' fee claim as well (Pet. App. 3). Concluding that the "in addition to" language of subsection (d) of the EAJA was "critical" (*ibid.*), the court held that when an award of costs is not allowable under 28 U.S.C. 2412(a), attorneys' fee awards under 28 U.S.C. 2412(d)(1)(A) are likewise precluded. In the court's view, the EAJA "did not expressly create a right

to fees if [as here] the award of costs was barred" (Pet. App. 5).[1]

ARGUMENT

The court of appeals' opinion represents a reasoned analysis of the EAJA as that Act existed at the time of the decision below and does not conflict with any decision of this Court. Although there is a conflict in the circuits on the issue presented by petitioners,[2] that conflict does not warrant review by this Court. The original legislation that spawned the conflict expired on October 1, 1984, and Congress has passed new legislation that will resolve the conflict for the future. In addition, review of the issue raised by petitioners would not necessarily result in a judgment in their favor. In light of its conclusion that the Commission is not subject to attorneys' fee assessments under the EAJA, the court of appeals had no occasion to decide whether the

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[1]The court of appeals did not discuss petitioners' claim for fees under subsection (b) of the EAJA, perhaps because petitioners did not raise it until the filing of their reply brief. Because that subsection contains the same "in addition to" language that the court found dispositive with respect to subsection (d), however, the court may have been of the view that petitioners' claim for fees under subsection (b) was barred for the same reason as was their claim under subsection (d). See also note 13, *infra*.

[2]The District of Columbia Circuit has ruled that attorneys' fees may be awarded against the Commission under the EAJA despite its agreement with the court of appeals in this case that the Act does not permit the assessment of costs against the agency. *Hirschey* v. *FERC*, 760 F.2d 305 (D.C. Cir. 1985). See also *Washington Urban League* v. *FERC*, 743 F.2d 166, 167 n.1 (3d Cir. 1984).

Petitioners also assert (Pet. 6-7) that the decision below conflicts with decisions of the Fifth and Eighth Circuits in two condemnation cases. *United States* v. *341.5 Acres of Land*, 751 F.2d 924, 935 (8th Cir. 1984); *United States* v. *329.73 Acres*, 704 F.2d 800, 808 (5th Cir. 1983) (en banc). However, the court below correctly distinguished those cases from the instant one on the ground that condemnation cases were explicitly mentioned in the EAJA's legislative history. See Pet. App. 5; cf. note 5, *infra*.

Commission's position was substantially justified. Absent a determination that it was not, petitioners would not be entitled to attorneys' fees in any event.

1. The pertinent language of subsection (d) of the EAJA, 28 U.S.C. 2412(d), authorizes attorneys' fee awards only "in addition to any costs awarded pursuant to subsection (a)." [3] The pertinent language of subsection (b) of the Act is virtually identical.[4] The ordinary and natural reading of this statutory language [5] is that "[Congress] condition[ed] the

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[3]Subsection (d) of the EAJA, 28 U.S.C. 2412(d), provides in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

[4]Subsection (b) of the EAJA, 28 U.S.C. 2412(b), provides:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

[5]This Court has emphasized that "deference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of a bill, generally require [courts] to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.' " *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 10 (quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962)). Courts may depart from the "plain meaning" of the statutory language only in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters * * *." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

award of fees and expenses upon the award of costs." *Hirschey* v. *FERC*, 760 F.2d 305, 311 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part). The court of appeals therefore correctly concluded that, because the Commission is not required to pay costs by virtue of Section 317 of the Federal Power Act, 16 U.S.C. 825p (a proposition not disputed by petitioners in this Court), the Commission likewise had no fee liability under the EAJA.

The approach adopted by the court of appeals is, moreover, consistent with the overall structure of the EAJA. As the court below pointed out (Pet. App. 5), the EAJA expanded the previous statutory authorization for the assessment of costs against the government to encompass, in certain circumstances, attorneys' fees as well. But the Commission's organic statute has always exempted it from the payment of costs (16 U.S.C. 825p), and thus any requirement that it pay attorneys' fees under the EAJA would create an anomaly inconsistent with Congress's parallel treatment of costs and attorneys' fees. Such a requirement also would be at odds with the settled rule that waivers of sovereign immunity must be unequivocally expressed. See, *e.g.*, *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983). In short, petitioners have failed to show that the decision below is "demonstrably at odds" with congressional intent. See note 5, *supra*.

2. In any event, the issue in this case is of no continuing importance. As originally enacted in 1980, portions of the EAJA contained a "sunset" provision (see 28 U.S.C. 2412 note), and, pursuant to that provision, subsection (d) expired on October 1, 1984. After a hiatus of nearly one year, the sunset provision was repealed, and subsection (d) was made permanent. Pub. L. No. 99-80, 99 Stat. 186. The critical "in addition to" language of subsection (d) was not amended by the 1985 legislation, but the legislative history of the new Act endorses petitioners' reading of the statute

for the future. The House Report on the 1985 legislation provides as follows (H.R. Rep. 99-120, 99th Cong., 1st Sess. 17 (1985) (citations omitted)):

> The language of section 2412(d)(1)(A) expresses the view that prevailing parties shall be awarded attorney's fees and, when available, costs as well. This approach ratifies the approach taken by four circuits. * * * Thus, the Committee rejects the interpretations of the statute by the 9th Circuit [in the instant case]. [6]

Although the Commission is of the view, for the reasons already stated (see pages 5-6, *supra*), that the court of appeals correctly interpreted the statutory language of subsection (d), which, as noted, was not altered in the 1985 legislation, the Commission henceforth will adhere to the expression of congressional intent set forth in H.R. Rep. 99-120, *supra*.[7] Accordingly, the issue presented by this case will not arise in future cases.

At the same time, however, it is clear from the new Act's effective date provisions that Congress intended the instant case to be resolved under the original Act.[8] Section 7

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[6]The Senate did not issue a separate report, and it passed the House bill without change. See 131 Cong. Rec. S9991 *et seq.* (daily ed. July 24, 1985).

[7]Subsection (b) of the EAJA, 28 U.S.C. 2412(b), was never subject to the original sunset provision, and thus it never expired. Nevertheless, it is only logical to give the same meaning to the "in addition to" language that appears in both subsections.

[8]Because the 1985 legislation did not amend the statutory language at issue, the new Act's effective date provisions may be technically irrelevant to the disposition of this case. The real issue is the significance of the post-enactment legislative history contained in H.R. Rep. 99-120, *supra*. See page 11 and notes 10-11, *infra*. Nevertheless, the new Act's effective date provisions provide clear legislative direction for determining the applicability of the 1985 legislation to particular categories of cases. By analogy, that structure offers implicit guidance on the effect of the new Act's legislative history for the same categories of cases.

of Pub. L. No. 99-80, 99 Stat. 186, provides in pertinent part:

> (a) *In General*—Except as otherwise provided in this section, the amendments made by this Act shall apply to cases pending on or commenced on or after the date of the enactment of this Act.
>
> (b) *Applicability of Amendments to Certain Prior Cases*—The amendments made by this Act shall apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this Act, except that in any such case, the 30-day period referred to in * * * section 2412(d)(1)(B) of title 28, United States Code * * *, shall be deemed to commence on the date of the enactment of this Act.

Inasmuch as this case was commenced *prior* to October 1, 1984, the triggering date referred to in subsection (b) above, the controlling provision is subsection (a), which makes the new EAJA applicable to cases "pending" on the date of enactment. But the legislative history of the new EAJA makes clear that a case is not "pending" for purposes of subsection (a) when the only matter pending is a request for attorneys' fees. This point was made explicit by Representative Kastenmeier, the chief sponsor and floor manager of H.R. 2378, the bill that became the new Act, and Chairman of the Subcommittee on Courts and Civil Liberties and Administration of Justice of the House Judiciary Committee, the subcommittee responsible for H.R. 2378 (131 Cong. Rec. H4762 (daily ed. June 24, 1985) (emphasis added)):

> *Cases which were pending on October 1, 1984, including fee application proceedings would be governed by the original act, provided that the time to file the fee application expired before the date of enactment of this bill.* This bill would apply to any case pending on October 1, 1984, and finally disposed of before the date

> of enactment of this bill, if the time for filing an application for fees and other expenses had not expired as of such date of enactment.

As these remarks make plain, the original EAJA applies to all cases pending on October 1, 1984, provided that the time for filing the fee petition had expired prior to the date of enactment of the new EAJA. As a practical matter, Representative Kastenmeier's explanation of the effective date provisions means that the original EAJA applies to any case in which the only matter pending on the date of enactment was a fee petition, because only in those cases would the time for filing a fee petition have expired prior to the date of enactment.

Other legislative history confirms Representative Kastenmeier's explanation of the effective date provisions. The House Report, for example, expressly contemplates application of the original EAJA to "pending" cases, stating that "[t]o the extent that amendments made by this Act merely clarify the original Congressional intent in EAJA these amendments will have the effect of informing judicial construction of pre-1985 provisions of EAJA *with respect to pending cases*." H.R. Rep. 99-120, *supra,* at 21 (emphasis added). Plainly, this statement is rendered superfluous if "pending" as used in Section 7(a) is construed to encompass *all* cases "pending" on the date of enactment. Such a construction would mean that there would be no case to which the "pre-1985 provisions of EAJA" could apply.

Under the effective date provisions of the new EAJA, as explained by Representative Kastenmeier, there can be no dispute that the original EAJA controls the disposition of this case. This case was a "fee application proceeding" that was "pending on October 1, 1984" (131 Cong. Rec. H4762 (daily ed. June 24, 1985) (remarks of Rep. Kastenmeier)). Under the original EAJA, the time for filing a fee application in this case expired 30 days after the court of appeals'

May 10, 1984 decision on the merits, or June 9, 1984.[9] Thus, "the time to file a fee application expired before the date [August 5, 1985] of enactment of [H.R. 2378]" (131 Cong. Rec. H4762 (daily ed. June 24, 1985) (remarks of Rep. Kastenmeier)), and this case is "governed by the original act" (*ibid.*).

This result is in accord with the principles outlined by the Court in *Bradley* v. *School Board,* 416 U.S. 696, 711 (1974) (emphasis added), in which the Court explained that "a court is to apply the law in effect at the time it renders its decision, *unless * * * there is statutory direction or legislative history to the contrary.*" The legislative history cited above falls squarely within the *Bradley* exception. See *Bradley,* 416 U.S. at 715-716 n.21; cf. *Bennett* v. *New Jersey,* No. 83-2064 (Mar. 19, 1985), slip op. 5-8. Moreover, Representative Kastenmeier's explanation of the effective date provisions is in accord with the interpretation given by several courts to the effective date provision of the original EAJA, which had made the Act applicable to "any civil action or adversary adjudication * * * which is pending on, or commenced on or after [October 1, 1981]." 5 U.S.C. 504 note. Applying this provision, a number of courts have held that the original EAJA did not apply to those cases in which the only matter "pending" on October 1, 1981, was an application for attorneys' fees. See, *e.g., Nichols* v. *Pierce,* 740 F.2d 1249, 1255-1259 (D.C. Cir. 1984); *Commissioners of Highways* v. *United States,* 684 F.2d 443, 444-445 (7th

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[9]Section 2 of Pub. L. No. 99-80, 99 Stat. 185 (to be codified at 28 U.S.C. 2412(d)(2)(G)), amended the EAJA by defining "final judgment," from which the 30-day period for filing a fee application begins to run, as "a judgment that is final and not appealable." Assuming, arguendo, that this amendment applies to the instant case, the time for filing petitioners' fee application would have expired 30 days after the last date on which the Commission could have filed a petition for a writ of certiorari, or September 7, 1984. However the 30-day filing period is calculated, therefore, this case is governed by the original Act.

Cir. 1982); *Tabcor Sales Clearing, Inc.* v. *United States,* 596 F. Supp. 402, 404 (N.D. Ill. 1984); but cf. *Knights of the Ku Klux Klan* v. *East Baton Rouge,* 679 F.2d 64, 68 (5th Cir. 1982); *United States ex rel. Heydt* v. *Citizens State Bank,* 668 F.2d 444 (8th Cir. 1982).

This case is therefore governed by the original Act, and it would thus be inappropriate to remand the matter for the court of appeals to consider the case under the new Act. This is particularly so in light of the fact (see page 6 and note 8, *supra*) that the pertinent statutory language was not altered in the 1985 amendments.[10] Although the Court occasionally remands cases for reconsideration in light of new legislation (see, *e.g., East Baton Rouge Parish School Bd.* v. *Knights of the Ku Klux Klan,* 454 U.S. 1075 (1981)), it does not follow that course of action when the only question to be determined is the weight to be accorded the post-enactment legislative history of a statutory provision that has not been amended.[11]

Moreover, such a course would be especially unwarranted here, because the instant case is the only case clearly affected by the decision below. Contrary to petitioners'

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[10]Accordingly, the statement in the House Report that, "[t]o the extent that amendments made by this Act merely clarify the original Congressional intent in EAJA these amendments will have the effect of informing judicial construction of pre-1985 provisions of EAJA with respect to pending cases" (H.R. Rep. 99-120, *supra,* at 21), is inapplicable to this case. Because the 1985 Act did not alter the pertinent language of subsections (b) and (d), there is no applicable amendment to "inform[ ] judicial construction" of this pending case.

[11]Undoubtedly, this is because "[a] mere statement in a conference report * * * as to what the Committee believes an earlier statute means is obviously less weighty" than subsequent legislation declaring the intent of an earlier statute. *CPSC* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 118 n.13 (1980). Compare *Heckler* v. *Turner,* No. 83-1097 (Feb. 27, 1985), slip op. 25 ("[T]he 98th Congress reiterated its immediate predecessor's intentions not just by words but by deed"); see generally *id.* at 23-26.

allegations of widespread impact, nearly all of the cases cited by petitioners (Pet. 13-14) as potentially being affected by the decision in this case have yet to be decided on the merits. Petitioners' concern with those cases is therefore premature. Should the Commission win the cases on the merits, attorneys' fees would not be awardable in any event. And if the petitioners prevail in those cases, any fee applications that may be filed will of course post-date the new legislation. For such cases, the Commission will, as noted, follow the intent expressed in H.R. Rep. 99-120, *supra,* with respect to the issue presented by this case. Because of the extremely limited impact of the decision below, therefore, review by this Court is unnecessary, as is a remand to the court of appeals to consider the post-enactment legislative history of the provision at issue.[12]

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[12]Only one case cited by petitioners (Pet. 13-14) is in a posture comparable to the instant one. In *Confederated Tribes & Bands of the Yakima Indian Nation* v. *FERC,* 746 F.2d 466 (9th Cir. 1984), cert. denied *sub nom. Public Utility Dist. No. 1* v. *Confederated Tribes & Bands of the Yakima Indian Nation,* No. 84-1365 (May 20, 1985), the court of appeals denied the fee application (which sought less than $6,000) on the basis of the decision below. Nevertheless, the court's opinion on the merits suggests that it also was of the view that the Commission's position was substantially justified, thus rendering a fee award inappropriate in any event. See, *e.g.,* 746 F.2d at 475 ("Viewed narrowly, [the Commission's position] comports with the cases [it] cited."). In any event, the request of the petitioners in that case that the court of appeals rehear their motion for attorneys' fees remains under submission.

We note also that one potentially similar case has arisen subsequent to the filing of the petition in this case. In *Steamboaters* v. *FERC,* 759 F.2d 1382 (9th Cir. 1985), reh'g pending, the court sustained the Commission's orders in all respects save one; as to that issue, the court remanded the case for a further explanation of the Commission's conclusion that a hydroelectric project would not harm the environment and did not require the preparation of an environmental impact statement. It seems doubtful that the petitioners in that case qualify as prevailing parties in these circumstances, but, in any event, their request for attorneys' fees has not yet been acted upon by the court of appeals.

3. Finally, there is nothing to indicate that review by this Court would alter the judgment in this case. Because of the manner in which the court of appeals disposed of the case, it had no occasion to consider the Commission's alternative argument that a fee award would be inappropriate in any event because the agency's position was "substantially justified." Absent a contrary finding by the court of appeals, petitioners are not entitled to any attorneys' fees. In this regard, it is important to note that the mere fact that the government loses a case does not create a presumption that its position lacked "substantial justification." S. Rep. 96-253, 96th Cong., 1st Sess. 7 (1979); H.R. Rep. 96-1418, 96th Cong., 2d Sess. 11 (1980). Indeed, the government need not even demonstrate that "its decision to litigate was based on a substantial probability of prevailing." S. Rep. 96-253, *supra,* at 7; H.R. Rep. 96-1418, *supra,* at 11. See also 131 Cong. Rec. H4763 (daily ed. June 24, 1985) (remarks of Rep. Kastenmeier) ("Proving [substantial justification] is not intended to be so difficult that the Government may only avoid fees by prevailing in the litigation.").

Applying this standard to the instant case, it seems extremely unlikely that the Commission's position would be held to lack substantial justification. The agency was defending a duly promulgated Commission regulation, issued after notice and comment rulemaking. Although the court of appeals disagreed with the Commission's interpretation of the Energy Security Act, it acknowledged that the legislative history was "scanty and inconclusive" (Pet. App. 11). Moreover, the court did not reject the Commission's argument that its interpretation of the statute was consistent with congressional intent as expressed in the conference report (*id.* at 12). In these circumstances, the Commission, even though unsuccessful on the merits, can hardly be

faulted for defending the agency's rule in court.[13] Accordingly, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13]As earlier noted, the court of appeals never even mentioned petitioners' claim for fees under the bad faith rationale incorporated in subsection (b) of the EAJA. However, there is absolutely nothing in either opinion of the court of appeals to support petitioners' contention that the Commission litigated this case in bad faith.

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